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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT TACOMA

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 PHILIP A. SMITH and KIMBERLY G.
11 SMITH,

12 Defendants.

CASE NO. C10-5364BHS

ORDER GRANTING UNITED
STATES' MOTION FOR
SUMMARY JUDGMENT ON
ISSUE OF LIABILITY

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14 This matter comes before the Court on Plaintiff's (the "United States") motion for
15 summary judgment on the issue of liability (Dkt. 21). The Court has considered the
16 pleadings filed in support of and in opposition to the motion and the remainder of the file
17 and hereby grants the United States' motion as discussed herein.

18 **I. PROCEDURAL HISTORY**

19 On June 27, 2011, the United States filed its motion for summary judgment as to
20 the issue of Defendants' liability in this action. Dkt. 21. On July 18, 2011, Defendant
21 Philip A. Smith ("Smith") filed a response in opposition to the motion (Dkt. 24), and on
22 July 21, 2011, the United States replied (Dkt. 25).

23 **II. FACTUAL BACKGROUND**

24 This is an environmental land use case arising from Smith's criminal violations of
25 the Clean Water Act ("CWA") that are now the subject of the instant civil action. *See*
26 Dkt. 1 (Complaint). On September 20, 2010, Smith entered into a plea agreement wherein
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1 he pleaded guilty to “[k]nowingly discharging, or causing to be discharged a pollutant,
2 into a water of the United States without a permit, as charged in Count One, in violation
3 of [CWA Section 301(a)], Title 33, United States Code, Sections 1311(a) and
4 1319(c)(2)(A) and Title 18, United States Code, Section 2.” Dkt. 22-1 at 3 (plea
5 agreement in Case No. 09-cr-5590BHS, Dkt. 26 at 2). The following facts were agreed to
6 in the plea agreement between Smith and the United States, and the plea agreement
7 supplies the following undisputed facts for the instant action:

8 [Smith] owned five contiguous parcels of real property located in
9 close proximity to the southeast corner of the intersection of Interstate
10 Highway 5 and State of Washington Highway 505 between Winlock and
11 Toledo, in Lewis County, Washington (the Smith property). The five
contiguous parcels comprised approximately 190 acres. [Smith] acquired
the five contiguous parcels over a three year period beginning in 2005.

12 The Smith property was an undeveloped parcel of real property
13 containing wetlands which constitute waters of the United States subject to
14 regulation by the federal government to under the authority of the Clean
Water Act. A system of wetlands and surface water bodies covered
15 approximately sixty-five percent (65%) of the Smith property. Included in
16 this system were five unnamed tributaries that drain into Lacamas Creek.
Lacamas Creek flows along the eastern portion of the Smith property before
discharging into the Cowlitz River. The Cowlitz River flows into the
Columbia River which flows into the Pacific Ocean.

17 Beginning in or about August 2005 and continuing until in or about
18 October 2047, [Smith] engaged in land clearing activities on the Smith
property. The activities involved use of heavy equipment, including
19 bulldozers and excavators to push, scrape and excavate wetland soils and
20 stream channel substrates that were subsequently redeposited or discharged
into waters of the United States throughout the Smith property. A total of
approximately 98 acres of wetlands were cleared or disturbed by the
mechanized land clearing activities, resulting in the removal of soils,
excavation of stream channel substrates and discharge of dredged materials.

21 None of the land clearing activities undertaken by [Smith], and
22 others acting under his direction, were authorized by state or federal
agencies responsible for implementing the Clean Water Act. While Smith
23 held a forest practices permit valid through July 2007 authorizing logging
activity on a ten acre section on an upland portion of the property, he had
24 not obtained, nor applied for, the requisite permit under Section 404 of the
Clean Water Act before engaging in the mechanized land clearing activities
25 that resulted in the discharge of dredged material into waters of the United
States.

26 *Id.*
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1 In signing the plea agreement, Smith acknowledged that the statutory penalties for
2 the offense were as follows: “imprisonment for up to three (3) years, a fine of not less
3 than five thousand . . . dollars . . . nor more than fifty thousand . . . dollars per day of
4 violation, a period of supervision following release from prison of not more than one (1)
5 year.” *Id.*

6 As part of his plea agreement, Smith agreed to pay \$20,000 as restitution to the
7 U.S. Environmental Protection Agency (“EPA”). *Id.* at 4. Also within the plea agreement,
8 the “parties agree[d] that the issue of restoring wetlands damaged by [Smith’s] conduct
9 will be addressed through resolution of a separate civil action brought by” the United
10 States, which forms the basis for the instant action. *Id.* The undersigned accepted Smith’s
11 plea agreement and entered judgment in his criminal case on January 11, 2011. Dkt. 22-4
12 (copy of judgment, Dkt. 32, in Case No. 09-5590BHS).

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14 Based on the foregoing, the United States filed the instant action seeking relief for
15 (1) the unauthorized discharges of dredged or fill materials under CWA Section 301(a);
16 and (2) the violation of an EPA order under CWA Section 309(d). The only issue raised
17 by the United States in its motion for summary judgment is whether Smith is liable for
18 these causes of action; the remedy to be applied in this case is an issue reserved for trial.
19 *See* Dkt. 21 at 2.

20 III. DISCUSSION

21 A. Summary Judgment Standard

22 Summary judgment is proper only if the pleadings, the discovery and disclosure
23 materials on file, and any affidavits show that there is no genuine issue as to any material
24 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
25 The moving party is entitled to judgment as a matter of law when the nonmoving party
26 fails to make a sufficient showing on an essential element of a claim in the case on which
27 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
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(1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply “some metaphysical doubt”). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-89 (1990).

B. The United States’ Motion for Summary Judgment

The United States moves for summary judgment as to the issue of liability under CWA Section 301(a) and under Section 309(d).

1. Section 301(a)

The United States argues that Smith’s plea agreement in his criminal case precludes him from arguing the issue of liability with respect to his violating CWA

1 Section 301(a). Dkt. 21 at 2; *see also* Plea Agreement at 2 (Smith pleaded guilty to
2 knowingly violating CWA Section 301(a)). Additionally, within the Joint Status Report
3 (“JSR”) submitted by the parties, Smith acknowledged that liability in this case is not in
4 dispute. *See* Dkt. 11 at 3. Smith acknowledges that he is bound by the contents of the plea
5 agreement (Dkt. 24 at 3), but now disputes whether he intended to concede the issue of
6 liability within the JSR. Dkt. 24 at 3 (asserting that he only ever intended to be bound by
7 his plea agreement). However, even if the Court did not consider Smith’s apparent
8 concession within the JSR, his claim that he is not liable for the CWA Section 301(a)
9 violation for which he pleaded guilty fails for the reasons discussed herein.

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11 In his opposition, Smith does not dispute that the doctrine of issue preclusion is
12 applicable in his case; instead he attempts to debate the extent of the environmental harm
13 the United States claims he caused to approximately 98 acres of his land without a permit.
14 However, Smith’s arguments on this point are immaterial as to the issue of liability and
15 relate only to the issue of remedy, which is not the subject of the United States’ summary
16 judgment motion. *See* Dkt. 21 at 2.

17 Accordingly, summary judgment is granted in favor of the United States on the
18 issue of Smith’s liability for violating CWA Section 301(a). *See, e.g., Real Prop. Located*
19 *at Section 18*, 976 F.2d 515, 519 (9th Cir. 1992) (holding that “guilty plea may be used to
20 establish issue preclusion in a subsequent civil suit”)¹; *Ivers v. United States*, 581 F.2d
21 1362, 1367 (9th Cir. 1978) (holding that guilty plea is “an admission of each and every
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24 ¹In *Real Prop.* the Ninth Circuit set out the criteria for applying “issue preclusion” in
25 cases involving criminal matters as follows: (1) prior conviction must have been for serious
26 offense so that defendant was motivated to fully litigate charges; (2) there must have been full
27 and fair trial to prevent convictions of doubtful validity from being used; (3) issue on which prior
28 conviction is offered must of necessity have been decided at criminal trial; (4) and party against
whom collateral estoppel is asserted was party or in privity with party to prior trial. Each of these
elements is met in Smith’s case and Smith does not offer any authority to the contrary. 976 F.2d
at 518; Dkt. 24 (Smith’s response in opposition to summary judgment).

essential element of the crime charged” and that the defendant was “collaterally estopped from denying” any of the elements “in a suit arising out of the same transaction and involving the same parties”).


2. Section 309(d)

The United States has withdrawn its motion for summary judgment on this issue. The United States concedes that Smith’s response in opposition to their motion raises material questions of fact.

IV. ORDER

Therefore, it is hereby **ORDERED** that the United States' motion for summary judgment as to the issue of Smith's liability is **GRANTED** as discussed herein.

DATED this 22nd day of August, 2011.


BENJAMIN H. SETTLE
United States District Judge